No. 77-422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL EDUCATION ASSOCIATION ET AL.,
Appellants,

v.

STATE OF SOUTH CAROLINA ET AL.,
Appellees.

On Appeal from the United States District Court for the District of South Carolina, Columbia Division

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION ET AL. IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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The State parties have joined issue with our jurisdictional statement by filing a motion to affirm. As we show below, that motion does not come to grips with important legal issues that make this a proper case for plenary appellate review.

I. THE STATE'S MOTION TO AFFIRM DISTORTS THE DISTRICT COURT'S RULING ON PURPOSEFUL DISCRIMINATION.

In our jurisdictional statement we showed (pp. 24-25) that the district court was required to apply the burden-shifting principle adopted by the Fourth and Fifth Circuits and embraced by this Court in *Keyes*—namely that

where, as here, plaintiffs show that public officials have adopted policies that exclude a disproportionately large number of black educators from employment coincident with desegregation, that showing thrusts upon school officials the "burden of justifying [their] conduct by 'clear and convincing evidence.'" Further, in discharging that burden, "it is not enough . . . . that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative [or discriminatory] intent was not among the factors that motivated their actions." *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189, 209-10 (1973). See *Chambers* v. *Hendersonville City Board of Education*, 364 F.2d 189, 192 (4th Cir. 1966) (en banc).

The State asserts that a "fair reading of the opinion of the District Court demonstrates that the Defendants were required to, and did, bear the burden of showing nondiscriminatory purpose in response to the *prima facie* case of the Plaintiffs" (Motion 19-20). The district court's opinion, however, gives no ground for concluding that the three-judge panel ruled either (a) that the plaintiffs had established a prima facie case of purposeful discrimination, or (b) that the State had proved "by clear and convincing evidence" that racial motivation was not a factor in the adoption and enforcement of the certification requirements.[1]

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[1] The State implies that the district court shifted the burden of proof since "[t]he State never disputed its burden of coming forward with the rebuttal evidence on the question of intent . . ." (Motion 20). The State's premise is false. In the trial court, the State sought to distinguish the burden-shifting cases cited by plaintiffs, rather than conceding that they govern this case. Thus, in Plaintiff's Conclusion of Law No. 10, plaintiffs showed that *Chambers* and *Keyes* established a burden-shifting principle and that that principle had been applied to "cases involving the use of NTE cutoff scores in *Walston* v. *Nansemond County School Board*, 492 F.2d 919, 924 (4th Cir. 1974); *United States* v. *Chesterfield County School District*, 484 F.2d 70, 72-73 (4th Cir. 1973); and *Baker* v. *Columbus Municipal Separate School District*, 329 F.Supp. 706, 720 (N.D. Miss. 1971), *aff'd.* 462 F.2d 1112 (5th Cir. 1972)." In its trial brief (pp. 24-25), the State countered that "[t]he cases cited in plaintiffs' proposed conclusion of law No. 10" are distinguishable and that "it is sheer fantasy to suggest that 1969 requirements were in any way similar to the actions of the defendants in other cases involving the NTE."

In reviewing the evidence relating to purposeful discrimination, the district court did not at any time say that the burden had shifted to the State. Elsewhere, when the court concluded that the burden of proof had shifted, it said so plainly. Thus, in the Title VII branch of the case, the court was careful to state that the burden of proof shifted to the State in connection with its certification use (NEA App. 33a) and its pay use (*id.* 43a). Furthermore, the court did not cite *Keyes* or the relevant cases from its own circuit, which hold that the adoption of NTE score requirements coincident with desegregation shifts the burden. *Walston* v. *Nansemond County School Board*, 492 F.2d 919, 924 (4th Cir. 1974); *United States* v. *Chesterfield County School Dist.*, 484 F.2d 70, 72-73 (4th Cir. 1974). *Cf. Chambers* v. *Hendersonville City Board of Education, supra.*

Most important, in reviewing the State's 1969 decision —which is the pivotal decision respecting use of the NTE as a certification instrument[2]—the trial court used language that negates any notion that it placed the burden of proof on the State much less that it required the State to meet its burden by "clear and convincing evidence":

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[2] The State agrees with us that it used the NTE as an instrument for fixing pay levels between 1945 and 1969 (when a dual system of public education was in effect) and that it first used the NTE to bar a substantial number of persons from certification in 1969 (when the schools were undergoing desegegration) (Motion 11-12 and n. 30).

> "We are unable to find any intent to discriminate with respect to this decision. *Plaintiffs offer no direct evidence of such an intent*, even though one obvious source, the black members of the committee, was apparently available to them. The State's authority to re-define minimal competence from time to time cannot be reasonably questioned." (NEA App. 15a; emphasis added.) [3]

According to the State, "[a]lthough phrased in terms of the lack of direct evidence, this statement simply expresses the Court's finding that the inference of discriminatory intent was rebutted in part by the inference that normally arises from a failure to produce available witnesses" (Motion 21). In other words, the trial court held that plaintiffs' prima facie case was rebutted in part by plaintiffs' own failure to put on additional witnesses. There, however, is no authority for the proposition that a prima facie case of purposeful discrimination is overcome by the plaintiffs' failure to present additional evidence. The *Keyes-Chambers* burden-shifting rule does not require a plaintiff to put on all available evidence. Nor is there authority for the proposition that a plaintiff's failure to call black witnesses who were equally available to both sides constitutes evidence, much less "clear and convincing evidence," that race was not among the factors that motivated the defendant school officials.[4] Thus, the

[3] To the same effect see the trial court's statement that, "plaintiffs have not demonstrated the required discriminatory intent with respect to any of the specific decisions setting certification standards based on NTE scores" (NEA App. 16a-17a)..

[4] It is well established that when witnesses are "equally available" to both parties, no inference is allowable from the failure to call such witnesses. II *Wigmore on Evidence* § 288 (3d ed. 1940); Divitt & Blackmar, *Federal Jury Practice and Instructions* § 17.19 (3d ed. 1977). Wigmore also points out that as a matter of logic the failure to produce witnesses is "*open* to an inference *against both parties*, the particular strength of the inference against either depending on the circumstances." II *Wigmore, supra*, § 288. If, as the State now concedes, it had the burden of rebutting plaintiffs' prima facie case, then the failure to produce witnesses from the 1968 committee—black or white—raises an inference against the State. Moreover, experience teaches that it would have been most unlikely for the white members of the 1968 study committees to have confided to the black members that the whites were supporting the proposed score changes in order to frustrate desegregation—though this assumption lies at the heart of the argument that an inference may be drawn from plaintiffs' failure to call black members of the committee.

State's convoluted interpretation of the district court's opinion is neither true to the text of the opinion, nor to the applicable principles of law that the State claims were being applied.

In sum, the district court did not say that plaintiffs' case foundered for want of "rebuttal" evidence, or that the State had met plaintiffs' prima facie case by "clear and convincing" evidence. The trial court made no mention of burden-shifting principles and said plaintiffs offered no direct evidence of discriminatory intent. Very simply, in deciding the issue of purposeful discrimination, the court below ignored the controlling decisions of this Court and the courts of appeals, and the State now agrees that those decisions are applicable.

II. THE STATE'S MOTION DOES NOT COME TO GRIPS WITH THE BUSINESS NECESSITY ISSUE.

The record shows that 47 States do not use cutoff scores on a standardized examination as a criterion for initial entry certification (NEA J.S. 33). The record also shows that ETS admonishes test users not to use cutoff scores to determine levels of pay (*id.* at 26-27). That evidence starkly presents the issue of whether the State's uses of NTE cutoff scores are justified by "business necessity" as Title VII requires. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971); *Dothard* v. *Rawlinson*, 45 U.S.L.W. 4888, 4890-91 and n. 14 (June 27, 1977). The State has not dealt frontally with this issue.

A. *Pay.* The State does not explicitly contend that there is a "business necessity" for using NTE scores to fix pay brackets. Instead, the State presents the case as though a lesser standard applies, saying that "there are several reasons why tying increases in salary to demonstration of knowledge makes *good sense*" (Motion 29; emphasis added). In this connection, the State first theorizes that "knowledge does not necessarily come with teaching" (*id.*). The State's own evidence contradicts this undocumented assertion. *Report of Investigation of Educational Qualifications of Teachers in South Carolina*, p. 262 (1944) (PX-1). See also the testimony of ETS, Manning Dep. p. 857. Second, the State asserts in the alternative that "even if knowledge did come with experience" the NTE will appropriately measure knowledge gained by the teacher on the job (Motion 30, 40). This assertion is contrary to the test developer's testimony (NEA J.S. 26-28) and the testimony of the State's primary testing expert, Dr. Robert Guion, who testified:

> "I am of the opinion that a test that has been validated in the way—has been developed and validated in the way that the N.T.E. has is not an appropriate instrument for making personnel decisions with experienced teachers or for making the kind of predictions that are implied when you say a person with a higher score is going to be a better teacher than the person with a lower score." (Guion Dep., p. 118.)

Third, the State attempts to buttress its notion of "good sense" with the assertion that "it is difficult to see how improvement in the amount of knowledge possessed by teachers holding substandard certificates could occur without incentives of higher salaries" (Motion 30). This argument overlooks the fact that the State can and does offer pay increases for taking further training at a college or university. In addition, the State conducts in-service training for teachers (Williams Dep. 26-27). The

NTE is not necessary to either of these improvement programs.

The fact is that where experienced teachers with similar training and experience are performing the same tasks, and are being evaluated as satisfactory or better, neither "business necessity" nor even "good sense" support a policy that singles out some of these teachers and pays them less than their peers because of their scores on the NTE Common Examinations. The State's pay policy is all the more insupportable since that policy has been condemned by the test developer as a misuse of the NTE, and since four committees which advised the State Board of Education and the State Board itself have recommended that the policy be discontinued.

B. *Certification.* The State presents its justification for the certification use as though the State needed only to show a "substantial interest" rather than a "business necessity" for its certification use (Motion 39). The State urges that because of disparities among the teacher training programs that the State monitors and approves, "the State had a substantial interest in achieving a statewide, objective measure of competence" (Motion 39; emphasis added). The State emphasizes that the measure of competence should be "objective" and that grades are based on "more subjective and less reliable judgments" than are NTE cutoff scores (Motion 39).

To be sure, the number 1132 is "objective"—*i.e.*, the number is free of personal or subjective feelings. But the process by which that number became a cutoff score dividing "competent" from "incompetent" elementary teachers was not objective. To set such cutoff scores panel members were asked to conjure up a "hypothetical" group of persons. The persons in the imaginary group were to fulfill not one, but two criteria—they were to be (a) minimally qualified to teach effectively and (b) minimally qualified to complete a teacher training program.

These panel members were then to perform a further mental feat: each was to determine what percentage of his imaginary group would know the answer to each item on the NTE. The exercise was not only highly subjective but also highly speculative, for the panel members had not taught 60 percent of the items about which they were asked to give an opinion. (NEA J.S. 14-15.) Grades, to be sure, are subjective, but at least they represent an effort by these same panel members and their peers to evaluate the competence of real people on subject matter that the professors actually teach to them.[5]

The State also urges that it is "not required to rely solely on diplomas, grades and experience" or "to alter its system of approving and monitoring educational programs at [its] institutions" (Motion 38). We have not suggested that the State is required to do so. But, in view of the facts that these alternatives do exist and indeed are widely used throughout the nation, and that only South Carolina, North Carolina and Mississippi require candidates for initial entry certification to meet a cutoff score requirement on a standardized test, there can be no reasonable arguments that "business necessity" justifies using NTE cutoff scores which will produce a candidate pool that is 96 percent white and 4 percent black.[6] *Dothard* v. *Rawlinson*, 45 U.S.L.W. 4888, 4890-91

[5] The only expert called by both sides, Dr. Robert Thorndike, testified that it is "as reasonable" to rely on grades as a definition of competence as to rely on cutoff scores generated from the "unanalyzed impressions upon which the [panel] judges were operating" (Thorndike Statement 12).

[6] The State disputes our "characterizations of the impact that the NTE has on black candidates," saying that the above figures are "statistically unreliable" and that our conclusions are "inaccurate" (Motion 20 n. 3). "Our" figures are derived from data that ETS supplied to the State and that the State relied on when it calculated the racial impact of the 1976 NTE cutoff scores in advance of their enforcement (Exh. P-M-80D; Maynard Dep. V, p. 46). Both the court (NEA App. 35a) and the State (Motion 16-17) make a point

n. 14 (decided June 27, 1977) (an employment practice with disparate racial effect "must be shown to be *necessary* to safe and efficient job performance to survive a Title VII challenge").

CONCLUSION

For the reasons set forth in the jurisdictional statements of the plaintiffs, the Court should note probable jurisdiction and set Nos. 77-422 and 77-543 for plenary consideration.

Respectfully submitted,

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of the fact that the State took account of this racial impact in setting the 1976 cutoff scores.

The State also says that the racial impact data cited by the plaintiffs in their jurisdictional statement "rest on a data base of two (2) persons who failed to meet the new scores on two area exams (Spanish and Chemistry, Physics and General Science) (Motion 20 n. 3). The State is in error. The data base that the State offered in evidence (Exh. P-80D) consists of the scores for 593 black and 3,615 white candidates for certification who took the NTE between November 1973 and July 1975. In Appendix A hereto, we have charted the State's data showing the racial impact that the 1976 score requirements would have had if those requirements were applied to this group of 4,208 recent candidates for certification.

EFFECTS OF 1976 CUTOFF SCORE REQUIREMENTS IF APPLIED TO SOUTH CAROLINA CANDIDATES TAKING NTE BETWEEN NOVEMBER 1973 & JULY 1975

Test	Number of Candidates By Race Taking NTE In 2 Year Period (November 1973 to July 1975)		Average Number Of Blacks Certified Per Annum	Average Number Of Whites Certified Per Annum	Percentage Of Blacks Eliminated By New Cut-Off Score	Percentage Of Whites Eliminated By New Cut-Off Score
	Black	White				
Agriculture	0	10	N/A	4.5	N/A	10
Art Education	8	91	.5	38.0	88	17
Biology & General Science	32	104	4.5	47.0	72	10
Business Education	59	81	6.0	32.5	80	20
Chemistry, Physics & General Science	1	27	0	12.0	100	11
Early Childhood Education	46	512	7.0	225.0	70	12
Education in the Elementary School	155	1182	9.5	413.5	88	30
Education of Mentally Retarded	21	154	3.0	56.0	71	27
English Language & Literature	35	235	5.5	111.5	69	5
French	4	43	.5	13.5	75	37
German—Common Examinations	0	9	N/A	3.0	N/A	33
Home Economics Education	18	57	.5	26.5	94	7
Industrial Arts Education	5	21	.5	10.5	80	0
Mathematics	40	154	2.5	63.0	88	18
Media Specialist	12	11	.5	5.0	92	9
Music Education	16	148	1.5	69.0	81	7
Physical Education	52	329	4.0	107.0	85	35
Social Studies	88	396	7.5	154.5	83	22
Spanish	1	30	0	9.5	100	37
Totals	593	3594	53.5	1401.5		